APPEAL NO. 93476

On May 10, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). The hearing officer determined that the respondent (claimant herein) suffered a compensable injury (a stroke) in the course and scope of his employment with his employer, on (date of injury). The hearing officer ordered the appellant (carrier herein) to pay medical and income benefits in accordance with her decision and the provisions of the 1989 Act. The carrier contends that the hearing officer erred in concluding that the claimant was injured in the course and scope of his employment and requests that the decision be reversed. The claimant responds that the evidence supports the hearing officer's decision and requests that the decision be affirmed.

DECISION

The decision of the hearing officer is affirmed.

The issue to be determined at the hearing was whether the claimant had a compensable injury on (date of injury). The parties stipulated among other things that on (date of injury), the claimant was employed as a warehouseman by the employer and had worked for the employer since 1989; that the claimant had a prior history of untreated hypertension which was a contributing factor to his stroke of (date of injury); and that the claimant suffered multiple cerebral infarctions on or before (date of injury), but the infarcts did not produce symptoms which the claimant or his wife noticed.

The claimant testified that he is 53 years of age. He said that on the morning of the last day he worked for the employer he did not feel unusual. He arrived at work about 7:00 a.m. and worked in the warehouse until he made a delivery of a 300-pound "creep feeder" to a customer. He could not recall what work he performed in the warehouse that morning. He testified that the creep feeder was loaded onto the truck using a forklift and that he and another person pulled it off the back of the truck with the use of a chain.

The claimant testified that about 1:00 or 1:30 p.m. he and two coworkers began unloading 50-pound bags of feed from a tractor-trailer into the employer's warehouse. The claimant said it was hot inside the trailer and inside the warehouse. The claimant testified that he and his coworkers used a dolly to unload the feed. The dolly would be rolled under a pallet in the trailer, "tipped backward," and then the dolly with the pallet on it would be rolled into the warehouse and the pallet would be set on the floor. The claimant said that 14 bags would be on a pallet which would equal 700 pounds on each pallet. The claimant agreed that he did not have to reach down and "grab a feed sack by the hands" because he said he used the dolly "for that." He also said that it takes "quite a few" dolly loads to unload a tractor-trailer and that a ramp was used to go from the trailer to the warehouse. The claimant testified that late in the afternoon he felt dizzy. He said that at about 4:00 p.m. he was sent home by (Mr. D), the president of the employer, because Mr. D thought he had

been drinking alcohol. The claimant denied drinking any alcohol that day. The claimant also said that at the time he was sent home, the tractor-trailer was "way over half unloaded." The claimant said that when he got home he sat down and drank water and that he "feel like it was--that stroke was coming on then." He said he went to the hospital the next day. The claimant did not agree that his last day of work at the employer was an easier day than his normal workday, but did testify that unloading feed from a truck was something he did every day at work and it was part of his routine day.

The claimant's wife testified that on the morning of the day the claimant was sent home from work he was fine. She said that when the claimant came home that afternoon he was sweating, his eyes were hazy, and his mouth was twisted or pulled to the left. She also said that the claimant could not talk "plain," that his speech was slurred, and that he walked "funny." She testified that the claimant went to bed about 9:30 that evening, but could not sleep. She said that the next morning the claimant was staggering so she took him to the hospital. She said that she knew that the claimant had not been drinking and that there was no alcohol on his breath when he came home from work.

(Mr. M), the employer's vice president, testified that the employer had "relatively slow and light work" the last day that the claimant worked for the employer. He said that September is part of the employer's slow season and that winter is the employer's busy season. He said that it was not unusual for the claimant to unload a couple of trucks by himself during the busy season. Mr. M said that the day before the claimant's last day at work, the employer's president, Mr. D, had seen the claimant in Mr. M's truck with a bottle of liquor that Mr. M had left over from a fishing trip, and that when they went out to the truck they found a soda bottle on the floor which was half-full of alcohol. The claimant admitted to the incident, but said he did not drink any of the alcohol. The next day, which was the claimant's last day of work, the claimant and two coworkers unloaded a feed truck at the warehouse. That afternoon, Mr. D and Mr. M saw the claimant and "presumed he had been drinking." Mr. M said that the claimant's mouth was drawn to the left side, his eyes were hollow looking, and that he "just appeared intoxicated to us; and we drew that conclusion from the day before." Mr. M further testified that Mr. D asked the claimant if he needed to go home and the claimant said yes. In evidence was a written job analysis of the claimant's job which was completed by Mr. M on January 25, 1993. Mr. M indicated in the job analysis that the claimant's job requires continuous (five to eight hours per day) lifting of between 25 and 50 pounds and continuous carrying of between 25 and 50 pounds, as well as continuous standing, walking, pushing, and grasping.

(Dr. T), treated the claimant at the hospital and after his discharge from the hospital. In a discharge summary dated September 11, 1992, he gave a final diagnosis of: 1) severe uncontrolled hypertensive disease of long standing; 2) severe hypertensive encephalopathy with multiple previous strokes, with a recent fresh stroke involving the motor area; and 3) ischemic heart disease secondary to long-standing hypertension.

In a letter from the claimant's attorney to Dr. T dated December 31, 1992, the claimant's attorney wrote:

We know that he [the claimant] was feeling "fine" the morning of 2 September 1992, but that he single-handedly unloaded an entire trailer of feed from 1:30 PM until 4:00 PM, noting that he got "too hot" while doing it. His boss noticed his condition and his twisted mouth and told him to go home.

In your medical opinion, did the strain of unloading the feed cause [the claimant] to suffer a stroke?

At the bottom of this letter Dr. T was asked whether in his medical opinion "the act of unloading the feed was a strain, which was a producing cause of his stroke," or whether the claimant's stroke was "unrelated to his job and his duties of 2 September 1992." By check mark, Dr. T indicated that the act of unloading the feed was a strain, which was a producing cause of the claimant's stroke. Dr. T added the following comment: "[the claimant] apparently had untreated hypertension, but heavy lifting is a known causative factor."

The carrier asked Dr. T several questions concerning the claimant in a letter dated March 15, 1993. One of the questions was "[w]ould you please provide your opinion as to what caused `fresh' infarcts which resulted in the partial paralysis?" to which Dr. T answered "strenuous activity in the heat could have provoked a stroke." He was also asked "what amount of weight would the claimant have had to lift, if any, to trigger the stroke?" to which Dr. T replied "any amount requiring a strain factor which would cause increase in B.P." In a letter to the claimant's attorney dated March 24, 1993, Dr. T stated that when he saw the claimant in the emergency room of the hospital on (date of injury), the claimant "showed a very definite stroke involving the left side." Dr. T reviewed the claimant's past medical history, including the fact that some five years earlier the claimant had been diagnosed as having hypertension and was put on blood pressure medication which the claimant stopped taking after the initial medication because he started feeling well. Dr. T then stated the following concerning the claimant's activities on the day of the stroke, previous history of strokes, and the connection between the claimant's work activities and his stroke:

He was doing his usual job, lifting feed sacks during the heat of early September and apparently had had a little busier day that (sic) usual. During the course of the day, he began having some slurred speech and started becoming slightly confused and was told to go home. The assumption being, from the employer, that he had probably been drinking. After he arrived home, the progression of the weakness, paralysis and loss of mental function continued and he was brought to hospital for evaluation where it was found he had had a stroke and imaging studies of his brain showed his stroke on the right side of his brain effecting the motor area. He did show about 20 to 25 other small strokes in the peripheral brain area scattered throughout the brain indicative of previous small strokes, but these were in areas where they would be silent and without symptoms or at least symptoms he might be aware of something going wrong. It is certainly a well established fact that strokes can be induced with heavy lifting and straining, plus the fact working in the heat of a boxed truck with markedly elevated temperatures. In my mind, there is no question but this could be an inducing factor for promoting a stroke at that time. The

previous areas of stroke in his brain were in areas that would not, as I mentioned, be causing symptoms that he presently developed. This was an acute process happening at that time with the first episode of a stroke involving a motor area. Certainly the symptoms of this stroke, as they were developing gradually over a short period of time while working, to the casual on-looker might mimic those of alcoholic intoxication with slurred speech, difficulty in functioning with his thinking process and walking with a stumbling or halting gait.

Pursuant to a benefit review conference (BRC) agreement the parties agreed that the claimant would be examined by (Dr. H), a neurologist, regarding the questions of whether the claimant had a stoke and whether the claimant's job was a producing cause of the stroke. Dr. H examined the claimant on March 16, 1993; stated the "present illness" as "had a stroke 9-3-92 while unloading feed at a feed store;" reviewed the claimant's past medical history; diagnosed, among other things, "status post CVA, right middle cerebral artery distribution" and hypertension; and opined that "I believe that the stroke is due to the patient's hypertension and not work related."

The hearing officer made the following pertinent findings of fact and conclusion of law:

FINDINGS OF FACT

No. 4. Claimant unloaded feed sacks from a tractor trailer for [the employer] on (date of injury), and claimant had uncontrolled hypertension while performing this activity.

No. 5. The exertion required to unload the sacks of feed for [the employer] on (date of injury) in the temperatures both inside and outside the trailer were a producing cause of the stroke that claimant suffered (date of injury).

CONCLUSIONS OF LAW

No. 4. Claimant suffered an injury that arose out of the course and scope of his employment for [the employer] on (date of injury).

While the carrier does not specifically challenge Findings of Fact Nos. 4 and 5, it does contend that the hearing officer erred in concluding that the claimant was injured in the course and scope of his employment. The carrier asserts that Dr. T's opinion is based on an incorrect assumption that the claimant spent four hours lifting heavy sacks of feed. The carrier asserts that there is no evidence or insufficient "scientific" evidence of a causal connection between the claimant's stroke and his work. The carrier also questions the "credentials" of Dr. T to render an opinion concerning the cause of the claimant's stroke.

A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10). It has been held that, in a workers' compensation case, as in any other case, the plaintiff has the burden of proving elements of his asserted claim by a preponderance of the evidence. Martinez v. Travelers Insurance Company, 543 S.W.2d 911 (Tex. Civ. App.-Waco 1976, no writ). It has also been held that in a workers' compensation case, the injured employee need not prove fault, but he must prove that his injury arose out of his employment and that this involves evidence of a causal connection between the employment and the claimant's injury. Parker v. Employers Mutual Liability Insurance Company of Wisconsin, 440 S.W.2d 43 (Tex. 1969). Of course, the hearing officer, as the trier of fact, is the judge of the credibility of the witnesses and the weight to be given their testimony and the inferences to be drawn therefrom. Martinez, *supra*; Article 8308-6.34(e). And, in reviewing the sufficiency of the evidence to support a finding or conclusion, only if we determine that the evidence is so weak or the finding so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust do we reverse. In Re King's Estate, 244 S.W.2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 93477, decided July 19, 1993.

It has been held that compensation benefits are recoverable if an employee as a result of exertion or strain on the job sustains a hemorrhage or rupture, notwithstanding the fact that predisposing factors contributed to the incapacity. Mountain States Mutual Casualty Company v. Redd, 397 S.W.2d 321 (Tex. Civ. App.-Amarillo 1965, writ ref'd n.r.e.). The question of whether a stroke was precipitated by a strain or exertion by the work the employee was performing is a question of fact to be determined by the trier of fact. Redd, *supra*. In Texas Workers' Compensation Commission Appeal No. 93470, decided July 26, 1993, we affirmed a hearing officer's decision that the employee did not suffer a compensable stroke, but in doing so pointed out that, as a matter of law, all stroke cases do not necessarily require causation to be proven by expert medical testimony as required in Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980). For example, in Aetna Insurance Company v. Hart, 315 S.W.2d 169 (Tex. Civ. App.-Houston 1958, writ ref'd n.r.e.), the court affirmed the jury finding of a compensable stroke where the claimant had a history of high blood pressure and the claimant's doctor testified several times to the effect that the shock the employee received from being berated by a customer "could have been" or "may well have been" the precipitating factor of the employee's stroke. The court held that the use of the quoted words by the doctor did not render his opinion insufficient. Likewise, in Curry v. Commercial Standard Insurance Company, 460 S.W.2d 464 (Tex. Civ. App.-Houston [1st Dist.] 1970, writ ref'd n.r.e.), the court affirmed a finding of a compensable stroke where the employee, who had hypertension, suffered a stroke at work while doing the same type of work he did every day, and the employee's doctor testified that what happened on the job "could" have precipitated the injury. The court pointed out that the Texas Supreme Court in Insurance Co. of North America v. Myers, 411 S.W.2d 710 (Tex. 1966), "expressly distinguished the Hart case as one of those in `medical situations not involving the highly uncertain medical problem of the nature, origin and aggravation of cancer' thus leaving unchanged the rule concerning the quantum of proof required to raise the issue of causal connection in stroke cases." *See also* Transport Insurance Company

v. Campbell, 582 S.W.2d 173 (Tex. Civ. App.-Houston [1st Dist.] 1979, writ ref'd n.r.e.) where the court affirmed a finding of a compensable stroke where the employee, who had a history of hypertension, received a blow to the head at work, subsequently suffered a stroke, and the doctor only testified to the effect that a blow to the head might cause a hemorrhage that might result in hemiplegia. *Compare* Houston Fire & Casualty Ins. Co. v. Biber, 146 S.W.2d 442 (Tex. Civ. App.-San Antonio 1941, writ dism'd judgmt cor.); Texas Employers Ins. Ass'n v. Young, 231 S.W.2d 483 (Tex. Civ. App.-Texarkana 1950, no writ); The Charter Oak Fire Insurance Company v. Morales, 733 S.W.2d 273 (Tex. App.-El Paso 1987, no writ).

In the instant case, it is readily apparent from Dr. T's comment in response to the claimant's attorney's letter of December 31, 1992, and from statements in his letter of March 24, 1993, that his opinion that the claimant sustained a strain at work which was a producing cause of the claimant's stroke was based on the assumption that the claimant was engaged in heavy lifting under hot working conditions on the day of the claimed work-related injury. To be sure, there were some discrepancies between facts which were relayed to Dr. T concerning claimant's work activities and facts that were developed at the hearing. Be that as it may, we believe that the gist of Dr. T's opinion is that strenuous activity, such as heavy lifting, in the heat could cause an increase in blood pressure and result in a stroke. From the evidence adduced at the hearing the hearing officer could fairly conclude that the claimant labored under hot working conditions for several hours while he unloaded the feed sacks from the trailer and that the claimant was engaged in strenuous activity in unloading the trailer. Also, while the claimant did not testify that he actually lifted the feed sacks up with his hands, he did testify that he used a dolly which he had to tip backward with 14 feed sacks on it weighing a total of 700 pounds and that he had to do this quite a few times. He became dizzy and was sent home by his supervisor when it was noticed that the claimant's mouth was drawn and his eyes hollow looking. The employer thought he was intoxicated; however, the claimant denied being intoxicated and Dr. T observed that the symptoms of a stroke can mimic those of alcoholic intoxication. We believe that the hearing officer could reasonably infer from the facts that tipping the dolly backwards involved lifting the 14 feed sacks off the floor of the trailer for if they were not so lifted the claimant would not have been able to move them from the trailer to the warehouse. Having reviewed the record, we conclude that there is sufficient evidence to support the hearing officer's conclusion that the claimant was injured in the course and scope of his employment and that the conclusion is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *See* Hart; Curry; Campbell, *supra*. The Curry case is not unlike the present case. In Curry, the court held that the testimony of the employee that he had been working hard doing the same type of work he did every day, that he had been working in a hot room, and that he felt pain in his head after he put down a 30-pound can was probative evidence to support the jury's finding of overexertion on the date of the stroke, and this evidence was supplemented by the doctor's opinion that what happened on the job could precipitate the injury.

Concerning the carrier's point on appeal which questions the qualifications of Dr. T to render an opinion concerning the cause of the claimant's stroke, we note that the carrier did not object to the introduction of Dr. T's opinions into evidence on the basis that he was not qualified to render such opinions. It has been held that, ordinarily, in passing on the

correctness of the trial court's ruling in admitting evidence, the reviewing court will consider the ruling in light of the objection made in the trial court, and the complaining party will not be heard to present reasons for excluding evidence other than those made in the trial court. Marsh v. The State of Texas, 276 S.W.2d 852 (Tex. Civ. App.-San Antonio 1955, no writ). Consequently, we find no merit in the carrier's assertion on appeal concerning Dr. T' qualifications. Furthermore, we note that Dr. T is a medical doctor and we find nothing in the record to indicate that he is not qualified, as a medical doctor, to render an opinion on the cause or causes of the claimant's stroke. There was, of course, conflicting medical evidence on the issue of causation; however, the weight to be given the medical evidence was within the province of the hearing officer. *See* Texas Employers' Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.], 1984, no writ).

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge